

WORKER PARTICIPATION IN CORPORATE MANAGEMENT – THE UNITED STATES VERSION

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‘Co-determination’ and ‘worker participation in corporate management’ are generally considered in the United States as European inventions, alien to the U.S. system of labor relations. The unions’ view was capsulized by the president of the Machinists’ union in the following terms:

We have no interest in replacing free enterprise with a more utopian system And we believe workers can receive a better share of the fruits of free enterprise at bargaining tables than in board rooms.¹

The unions’ opposition to workers becoming ‘a partner of capital’ was put even more bluntly by the Secretary-Treasurer of the AFL-CIO:

He (the American worker) is smart enough to know, in his bones, that salvation lies – not in reshuffling the chairs in the board room or in the executive suite – but in the growing strength and bargaining power of his own autonomous organization.²

This negative view, shared equally strongly by management, focuses almost entirely on only one form of worker participation – employee or union representation on supervisory boards of corporations. It neglects other forms of much greater practical and social importance – particularly, representation of employees at the plant or enterprise level by elected works councils. The narrow focus obscures the fact that the U.S. also has a system of worker participation through which employees can influence and determine decisions of corporate management – the system of collective bargaining.

Historically, collective bargaining in the U.S. is rooted deeply in the values of industrial democracy, the same values out of which European systems of co-determination have grown. Those values were articulated by an Industrial Commission created by Congress in 1898:

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By the organization of labor, and by no other means, is it possible to introduce an element of democracy into the government of industry. By this means only the workers can effectively take part in determining the conditions under which they work. This becomes true in the fullest and best sense only when employers frankly meet the representatives of the workmen and deal with them as parties equally interested in the conduct of affairs . . . The union is a democratic government in which he (the worker) has an equal voice with every other member. By its collective strength he is able to exert some direct influence on the conditions of (his) employment.³

In 1916, the Commission on Industrial Relations, whose recommendations foreshadowed the National Labor Relations Act,⁴ responded to words of Louis D. Brandeis, which would be equally applicable to employee representation on corporate boards or plant level works councils:

We must bear in mind all of the time that however much we may desire material improvement, and we must desire it for the comfort of the individual, that the United States is a democracy, and that we must have, above all things, men. It is to the development of manhood to which any industrial and social system must be directed . . . And therefore the end for which we must strive is the attainment of rule by the people, and that involves industrial democracy as well as political democracy. That means that the problems of the trade should no longer be the problem of the employer alone . . . The employees must have the opportunity of participating in the decisions as to what shall be their condition and how business shall be run.⁵

The National Labor Relations Act established a statutory framework for employee representation through unions in a system of collective bargaining.⁶ To be sure, the law in the U.S. does not require employee membership on corporate boards, as does the law in Denmark or Germany.⁷ But the union may have a more effective voice in management decisions through its strength at the bargaining table than it would through minority representation in the corporate board meeting. The U.S. has no statutorily required system of works councils, as do Germany, France, Belgium and the Netherlands.⁸ But employees covered by collective agreements are effectively represented at the plant level on a day-to-day basis by contractually created grievance procedures. In the U.S., the collective agreement and the union grievance procedure are the institutions of industrial democracy through which workers participate in co-determining decisions of corporate management.

The purpose of this paper is not to try to demonstrate that collective bargaining in the U.S. is the historical or functional equivalent of European institutions of co-determination. Quite the contrary, for the differences are often more striking and instructive than the similarities. Nor is the intent to present a comparative study of systems of worker participation, for that would require examination of the functioning of varied systems, each in its special social context. The limited purpose here is to describe collective bargaining in the U.S. from the perspective of a system of industrial democracy in which employees "have the opportunity of participating in the decisions as to what shall be their condition and how business shall be run".⁹ Emphasis will be on those aspects which will make more visible certain comparisons

and contrasts with European institutions, and also on some of the strengths and weaknesses of our collective bargaining as a system of worker participation.

1. Basic characteristics

Worker participation in the U.S. exists only within the framework of collective bargaining. It therefore depends upon the legal provisions relating to collective bargaining and the practical operation of collective bargaining systems under those legal provisions. Basic to the system which has evolved under the law are certain characteristics which should be made explicit at the outset.

First, and most obvious, the only instrument through which employees as a group can participate is a trade union. Although the statute permits representation by a 'labor organization', which is very broadly defined, representation is in practical terms either by a local union affiliated with a national trade union, or the national trade union itself.¹⁰

Trade unions in the U.S., like unions in most countries, do not limit themselves to collective bargaining, but engage in a wide range of social welfare and political activities, many of which are far removed from representing employees in collective bargaining.¹¹ Although unions in the U.S. are not affiliated with any political party, they regularly support particular candidates for political office; and though many unions have no articulate political philosophy or program, they all regularly oppose or support particular legislative proposals. The views of the union on particular candidates and particular legislative proposals are often controversial and are not shared by substantial segments of workers. Because of this combination of functions in the union, individual workers or groups of workers may be confronted with the fact that the only voice they can have in decisions concerning their terms and conditions of work is through a union with whose political positions they disagree.

Second, worker participation in the U.S. is based on free choice. Unlike the German Works Council Act,¹² for example, the law does not impose a system of representation by requiring the creation of a works council in every enterprise, but instead protects employees in choosing whether or not to have a system of representation and in choosing the union that shall represent them.

Section 7 of the National Labor Relations Act declares:

Employees shall have the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection, and shall also have the right to refrain from any or all such activities . . .¹³

Section 8 of the statute affirmatively protects the free exercise of these rights against any economic or physical restraint by either unions or employers, and specifically prohibits "discrimination in regard to hire or tenure of employment or any

term or condition of employment to encourage or discourage membership in a labor organization . . .",¹⁴ whether that discrimination is by the employer alone or is caused by the union.

There is no need to spell out here the scope of these rights. The important point is that the statute by its terms protects equally the right of employees to organize and bargain collectively and the right to refuse to organize and to reject collective bargaining — that is, freedom of choice whether to have or not to have a system of participation.

In practice, these are not equally protected rights. Many, if not most, employers in the U.S. resist unionization and the establishment of collective bargaining. Because of their control over jobs and the work place, they have available a range of devices to discourage employees from choosing in favor of collective bargaining. Nor do employers limit themselves to legal means of persuasion. In 1975, the National Labor Relations Board, charged with administering the National Labor Relations Act, issued 2,983 complaints against employers charging them with unfair labor practices, and it ordered the reinstatement of 3,816 employees and awarded \$11,300,000 in back pay.¹⁵ Many violations go undetected and unremedied, and the Board orders often come too little and too late to give employees a real sense of freedom of choice. To be sure, unions also have available devices to induce employees to join, and unions also at times go beyond legal means of persuasion, but allegations of union violations are far less frequent.¹⁶ It can be fairly said that where collective bargaining does not already exist, the external pressures on employees to choose against unionization are far greater than the pressures to choose in favor. The practical effect is that, despite the legal principle of freedom of choice, employees are discouraged from choosing to establish a system of participation.

Third, the legal principle of freedom of choice is implemented and qualified by the principle of majority rule.¹⁷ Whether there shall be collective bargaining and through which union depends upon the majority of the employees in a so-called 'bargaining unit'. If the majority in the bargaining unit rejects representation by a union, then there will be no system of participation for any employee in that bargaining unit.

The consequence of freedom of choice implemented by majority rule is that in the U.S. less than one-third of all employees in private employment are covered by a collective agreement.¹⁸ In many basic industries such as steel, rubber, auto and transportation almost all hourly wage workers are covered, but many salaried employees are not covered. In coal mining and construction, less than half of the workers are covered, and in banking, insurance and service industries such as retail stores, hotels and restaurants, only a small portion of employees are covered.¹⁹ As a result, more than two-thirds of all private enterprise employees in the U.S. have no structure for participating in the decisions of corporation management.

Fourth, the statutory principle of majority rule carries with it the principle that the majority union is the exclusive representative of all employees in the bargaining unit. The principle of exclusive representation has two separable aspects which are

crucial here. One aspect is that when a union obtains a majority in a bargaining unit, no other union or group can represent the employees in that unit.²⁰ The majority union is the sole spokesman for all employees; it alone can negotiate with the employer; it alone can make a collective agreement; and its collective agreement applies to all employees regardless of union membership. The other aspect is that the presence of a majority union excludes even an individual employee from representing himself in determining the terms of his own employment contract. The collective agreement fixes the terms and conditions of employment, both minimum and maximum for every individual. Unless the union consents, he cannot bargain for anything different, whether better or worse;²¹ and only rarely does the collective agreement allow for any individual bargaining.

Fifth, the relation between the union and employer is conceived as one of structured confrontation, with the law prescribing the framework and regulating the conduct of the parties in their confrontation. The parties are legally required to meet and bargain in good faith, and a large body of law has developed as to what behavior is permitted at the bargaining table and what behavior is prohibited. But the legal rules, and the figures of speech with which they are expressed, are built on the image of opposing parties facing each other across the bargaining table. This fairly describes the dominant attitude and conduct of the parties in bargaining, for although they realize that they both have an interest in the future of the enterprise, their language and positions emphasize the clash of interests, often with the most virulent hostility, before agreement is reached.

If bargaining fails to produce agreement, the confrontation becomes economic conflict, with the use of the strike and the lockout. The Norris-LaGuardia Act permits the President to postpone the conflict for 80 days, if a strike or lockout affecting all or a substantial part of an entire industry would "imperil the national health or safety",²² but there is no legally imposed arbitration of interest disputes, and the parties rarely agree to submit their disputes over the making of a contract to binding arbitration.

Disputes arising during the collective agreement are characterized by the form of confrontation but less by its substance. Grievance procedures are structured as meetings between representatives of opposing parties — the union presents the grievance, the employer denies it, and the union appeals. Grievance meetings in practice, however, more often have a character of mutual problem-solving, with specific disputes resolved, new rules agreed upon, and misunderstandings dispelled. If the parties are unable to reach agreement, the final confrontation under 95% of collective agreements is not the strike,²³ but arbitration, and less than 1% of all grievances reach this final step.

These five basic characteristics of the collective bargaining system in the U.S. present a background for describing that system from the perspective of whether it provides employees with a voice in the decisions of management in the enterprise in which they work. In describing the system, focus will be on three questions: (1) how do employees exercise their choice as to whether they shall have a system of

participation, and, if so, what union shall represent them? (2) what decisions of management are subject to the union's influence and how effective is the union's voice in influencing those decisions? and (3) what voice do the employees have in the decisions of the union which acts as their representative? Not reached by these three general questions is a fourth and more specialized question: what legal problems would be raised by union representatives sitting on corporate boards of directors?

2. Choosing the bargaining representative

A. The union election

To act as the exclusive bargaining representative, the union must demonstrate that it has the support of a majority of the employees in the bargaining unit. It may demonstrate this support in two ways. First, the union may obtain signed cards from a majority of the employees, authorizing it to act as their bargaining representative. In principle, the employer is legally obligated to recognize a union which has thus demonstrated its majority support, but the employer can express doubts that the authorization cards have been validly or voluntarily signed, and insist that the union prove its majority support in an election.²⁴

The second way a union may demonstrate its majority status is through an election conducted by the National Labor Relations Board. The Board determines the bargaining unit, determines which employees are eligible to vote, and sets the time and place of voting. A period of about a month is generally allowed for campaign purposes, and the voting is usually held at the work place under the supervision of Board officials. Normally, more than 90% of all eligible employees vote.

Voting is by secret ballot, and the ballot includes the names of any competing unions and also the choice of 'No Union'. If none of the choices obtains a majority on the first balloting, a run-off election is held between the two highest votes. If a union ultimately obtains a majority, it is certified by the Board as the majority representative. If the choice of 'No Union' obtains a majority, this result is certified and there is no bargaining representative. In 1975, the Board conducted 8,638 elections involving 446,978 employees, and in 4,034 of these elections the result was 'No Union'.²⁵

The Board not only supervises the balloting, but enforces standards of conduct during the campaign period to preserve what it has described as 'laboratory conditions' which will enable employees to make a free, informed and rational choice. An election may be set aside and a new election ordered if one of the parties engages in coercive conduct, interferes with free solicitation, makes deliberate misrepresentations at a time when they cannot be refuted, engages in appeals to racial hatred or discrimination, or otherwise destroys the 'laboratory conditions'.²⁶

It should be emphasized that elections are not held periodically, for an election

is held only when there is a showing of substantial support for a change in the status quo — usually the signature of 30% of the employees in the unit. Thus, where there is no collective bargaining, no election will be held until some union makes a showing of 30% support. Similarly, where there is collective bargaining, no election will be held until there is some challenge to the union's majority status, either by a showing that 30% of the employees desire a change, or when the employer questions whether the union still has majority support.²⁷

Where collective bargaining is established, often no challenge is raised over long periods of time. In many bargaining units, particularly in the major industries, there have been no elections and no change of majority representative since collective bargaining was established in those units 30 or 40 years ago. One reason there are rarely new elections is that often there are no competing unions to raise a challenge to the incumbent union. Even where two unions claim jurisdiction over the same category of workers, and compete in the initial election, the union which wins tends to become solidified in its position as majority representative so that challenges have little prospect of success. In addition, unions affiliated with the AFL-CIO have a 'No Raiding Pact' under which the member unions agree not to seek an election where another member union is the bargaining representative.²⁸ This pact is considered a contract which is legally enforceable by the courts.²⁹

A procedure is available to employees who are represented by a union to obtain an election to decertify the union and return to the status of having no representation. The number of employees rejecting collective bargaining once having been covered, however, is relatively small. In 1975, there were 445 elections involving 15,303 employees in which the union was decertified.³⁰

B. Qualification of the representative

The basic qualification of a union to act as the bargaining representative is that it be the free choice of the employees. It need not register, file any reports, or obtain any prior approval from a governmental authority. The Labor Management Reporting and Disclosure Act of 1959 (LMRDA)³¹ requires unions to recognize certain democratic rights of members, follow certain election procedures, and file certain financial reports, but failure to observe these requirements, while subject to affirmative sanction, will not disqualify the union. The law seeks to correct the violations without depriving employees of their choice of representative.³²

Employees are not limited to choosing a union which customarily represents employees in their particular craft or industry if the union is willing to represent them. The Auto Workers union may represent bank employees, the Steelworkers may represent mushroom growers, and a Truck Drivers union may represent nurses.³³ In general, any union may legally represent any group of employees.³⁴

One crucial qualification is imposed. A union which seeks to act as bargaining representative must be free of any employer support or control. Prior to enactment of the National Labor Relations Act of 1935, employers used a variety of employee

representation plans as substitutes for, or shields against, regular trade unions. These 'company unions', as they were called, were typically organized on the initiative of the employer, who determined their structure and functions without any genuine free choice by the employees. Amendments to the plan or union constitution could be made only with the consent of the employer; meeting rooms, secretarial services and supplies were provided by the employer; and supervisors were often active organizers and served as officers.³⁵ Although such organizations provided the form and sometimes some substance of worker participation, they lacked the independence and economic strength to confront the employer effectively in collective bargaining; and their existence and recognition by the employer obstructed the organizational efforts of genuine unions.

The statute sought to outlaw 'company unions', making it an unfair labor practice for an employer "to dominate, or interfere with the formation or administration of any labor organization or contribute financial or other support to it". The statutory words have been broadly applied to reach any employer involvement in creating the organization, such as provision of meeting rooms, office space, postage or other financial aid, or participation in the organization's decisions. Any participation by supervisors in drafting by-laws, soliciting members, serving as officers, or attending meetings violates the requirement that there be total independence from employer influence or control and bans the organization from representing the employees in any matter concerning wages and working conditions.³⁶

These strictures against the employer supporting or participating in the affairs or decisions of an employee representative substantially preclude employees from being represented through any plan or structure other than a labor organization which bargains with the employer at arm's length as an adversary.³⁷ The employer is effectively prohibited from establishing joint employee-employer councils; and even a committee system created by the employees, with committees elected by the employees, will be barred if supervisors or other management personnel sit on those committees.³⁸ In practical terms, employees must choose between being represented by a union engaged in arm's length bargaining or not being represented at all.³⁹

Although receiving any financial aid or physical facilities from the employer at the time the union is being organized can cause it to be condemned as a 'company union', such total independence is not required once the union has obtained a majority and negotiated a collective agreement. The union is then viewed, in some respects, as a partner in administering the collective agreement, and the employer can give the union some forms of support in its performance of the representative function. The employer can provide the majority representative with office space, supplies and meeting rooms for the union stewards and grievance committee. The employer can also pay union stewards and committee members for the time spent investigating and processing grievances and in attending grievance meetings. This is justified on the ground that the stewards and committee members are helping resolve employment relations problems which are of concern to the employer.⁴⁰ In

some plants, union stewards may spend full time in grievance work, performing no production work, but nevertheless be paid their regular wages by the employer.⁴¹

C. Determination of the bargaining unit

The bargaining unit consists of the employees grouped together for purposes of representation. It is an election district for determining which union, if any, has a majority, and it is a governing unit for determining the employees who are subject to the majority union's exclusive authority. It might be described as the unit for worker participation.

The legal authority to determine the bargaining unit rests in the National Labor Relations Board, not in the union and the employer.⁴² One reason for placing the authority there is that the employer and the one or more competing unions may be unable to agree on the boundaries of the unit; but a more crucial reason is that the employer and the union may not adequately consider the desires of those groups of employees who do not want to be represented by any union or who want to be represented by a different union. By agreeing to a large unit, the union and employer could deprive such groups of their freedom of choice, swallowing them in a larger majority when smaller units might be appropriate. The union and employer cannot be entrusted with the authority to determine whether dissenting groups shall be subject to the union's exclusive control. The Board is responsible for considering the interests of all groups, both large and small, in drawing the boundaries of the bargaining unit.

The statute provides that "The Board shall decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof . . .".⁴³ These words reveal the underlying assumption of the statute that the bargaining unit will not extend beyond a single employer and that the single employer's employees may be in several different bargaining units. Although the courts have interpreted the statute as allowing the Board to create multi-employer units,⁴⁴ the underlying assumption still dominates the actual determination of bargaining units.

In determining the bargaining unit, the Board weighs a number of factors which relate to two basic considerations: (1) the practical needs of collective bargaining, and (2) adequate representation of all employees in the bargaining unit. The factors weighed by the Board include (a) the community of interests of employees in such matters as similar skills, similar work, similar benefits and physical proximity; (b) integration of the production processes and interdependence of the work performed; (c) administrative organization of the employer's supervision and personnel policy making; (d) the history of collective bargaining with the particular employer or the practice in the industry; and (e) the wishes of the employees.⁴⁵

In practice, these factors lead to a fragmentation of the enterprise into multiple bargaining units. In a single plant, there will typically be separate bargaining units for production workers, maintenance or skilled craft workers, clerical and office

employees, and professional employees,⁴⁶ and there may be additional units for particular crafts or departments. Each unit may be represented by a separate union negotiating a separate contract, although some units often have no representation at all. If the enterprise has several plants, there may be a similar pattern for each plant, and the production workers in one plant may be represented by a different union than production workers in another plant. Employees of a single enterprise may be represented by 40 different unions, with one-third of the employees having no representation at all.

Because of this fragmenting of employees into separate bargaining units represented by separate, and often competing, unions, there is normally no organization, council or committee which can speak for them with a unified voice or deal with management decisions of general concern. Participation is almost inevitably limited to those decisions which directly affect the employees in the particular unit. This can be overcome by unions which represent different units joining together to bargain as a coalition and make either similar contracts or a single contract. In practice, however, they seldom do so. Each bargains separately, making and administering its own contract, thereby balkanizing the work force along the boundary lines of the bargaining units.⁴⁷ The effect is to limit significantly the scope and effectiveness of worker participation in management decisions.

3. Union influence on management decisions

Worker participation in management decisions is measured in the U.S. by the influence which the majority union can exert over those decisions in collective bargaining. This influence is shaped, in the first instance, by the National Labor Relations Act which requires the employer to bargain in good faith with respect to wages, hours, and other terms and conditions of employment. But the union's influence is ultimately defined by the collective agreement negotiated with the employer, and that may be broader in some respects and narrower in other respects than the sphere of influence described by the statute.

A. Union influence over mandatory subjects of bargaining

The statutory duty to bargain does not require that an agreement be reached. The employer and union must be willing "to meet at reasonable times and confer in good faith", but that does not require either party to agree to a proposal or to make a concession. The employer must listen to the union and weigh its argument; he must state his position and give his reasons; he must make a good faith effort to find common ground for agreement; and if agreement is reached, he must be willing to make a written contract.⁴⁸ But if after full discussion, the employer is not persuaded, he need not agree.⁴⁹ The employer can insist, for example, that certain seniority rules should govern layoffs, and the union's only recourse is to strike to

induce him to change his mind. Whether the union's or the employer's choice, or some compromise, is written into the collective contract depends first on persuasion and finally on economic strength, not on any legal intervention or third party decision.

The legal duty to bargain extends only to those matters which fall within the statutory words 'wages, hours and other terms and conditions of employment'. These are termed 'mandatory' subjects of bargaining. Categorization of a subject as 'mandatory' distinguishes it in three significant respects from the other subjects about which the parties might bargain. First, an employer cannot make any change in a mandatory subject without first bargaining to impasse with the union about the change.⁵⁰ Second, the union may propose changes in a mandatory subject and require the employer to bargain about that change.⁵¹ Third, the union can strike or use other forms of economic force to try to compel the employer to agree with the union on a mandatory subject.⁵² None of these three propositions is applicable to non-mandatory subjects.

For example, compulsory retirement rules and pension plans are mandatory subjects of bargaining. The employer, therefore, could not institute a compulsory retirement rule without first bargaining with the union to impasse on whether there should be such a rule and what it should be. The union could insist that the employer discuss the union's proposal for the creation of a private pension plan for all employees over 60 years of age. And the union could strike to try to compel the employer to agree to the compulsory retirement rules and pension plan desired by the union.

On the other side, the kind of product to be produced is not a mandatory subject of bargaining. The employer, therefore, could eliminate a product or change its design without notice to the union. If the union struck in protest, the strike would be illegal.⁵³

Not all mandatory subjects, however, are necessarily governed by the collective agreement; some may remain under the full control of the employer. The employer can take the position in bargaining that certain mandatory subjects should not be governed by rules in the collective agreement, but should remain within his discretion to change as he sees fit during the life of the contract.⁵⁴ Thus, he may insist on a management prerogatives clause in the contract which gives him the freedom to decide when the work day shall begin, what work shall be assigned, who shall be promoted or transferred, who shall be dismissed, when employees shall retire, and what pensions they shall be paid. Again, the union's only recourse is to use persuasion or economic force to try to narrow the management prerogatives clause.

In summary, a worker has no legal right to participate in decisions which are outside the scope of mandatory subjects of bargaining. The employer can act unilaterally without any notice to the union and need not even listen to the union's proposals concerning a non-mandatory subject. And the union cannot use economic force to induce the employer to discuss such a subject, much less agree to a union proposal about it. Even within the scope of mandatory subjects, the worker's par-

ticipation in decisions depends upon the union's power of persuasion and its economic strength. The employer, by bargaining for a broad management prerogatives clause, can totally remove a wide range of subjects from any possibility of worker participation during the life of the contract.

B. The scope of mandatory subjects

The statutory words "wages, hours and other terms and conditions of employment" cover a wide field whose outer boundaries are not clearly marked.⁵⁵ Profit sharing, year-end bonuses, paid holidays, severance pay and pensions are all considered forms of wages, and even the price and quality of meals in the employer's cafeteria and the rent in employer-owned houses may come within the term. 'Conditions of work' includes not only heat, ventilation and safety conditions, but also who shall be hired, who shall be assigned to particular jobs, who shall be promoted, who shall be laid off when the work force is reduced, and when an employee may be discharged or otherwise disciplined.

It is more difficult to describe the management decisions that are beyond the boundaries of mandatory subjects and the right of employees to participate in those decisions. It is quite clear, however, that the right to participate does not reach all decisions which may affect the employees' work or job security. The U.S. Supreme Court has held that an employer could not, without first bargaining with the union, subcontract the maintenance work in his plant where the subcontracting simply substituted one group of employees for another doing the same work.⁵⁶ The limitations of the case, however, were underlined by a concurring opinion which declared that the employer must remain free to make unilateral decisions "which are fundamental to the basic direction of the corporate enterprise, or which impinge only indirectly upon employment security . . .". The duty to bargain does not reach "managerial decisions which lie at the core of entrepreneurial control", even those decisions which "may quite clearly imperil job security or indeed terminate employment entirely".⁵⁷

From judicial opinions and Board decisions it appears that management can decide unilaterally what new products shall be produced and their design and quality, what new equipment may be introduced, what capital investments shall be made and how they shall be financed, and whether the enterprise shall be expanded, contracted or liquidated. Similarly, the employer can decide unilaterally to eliminate a product line, shut down an operation, close one plant and transfer the work to another plant, merge with another corporation or sell the business.⁵⁸

These management decisions can be made without any right or opportunity of the employees to participate in the decision. The employer need not inform the employees' representative in advance of the decision, give the reasons for the decision, or even listen to a protest against it. The employer can refuse the union's demand to put into the collective agreement any provision limiting his freedom to make these decisions or to notify the union in advance of making such decisions. If the

union strikes to protest against such a decision and get it reversed, or to obtain a contractual provision requiring consultation in advance of such a decision, the strike will be illegal.

C. Scope of the collective agreement

Worker participation in management decisions is measured ultimately not by the duty to bargain collectively but by the provisions of the collective agreement. As has been pointed out, the collective agreement may leave some mandatory subjects to unilateral control by management, either by containing no provisions regulating those subjects or by explicitly reserving control in a management prerogatives clause. The contract may also cover some subjects which are not mandatory subjects, for the employer may voluntarily submit any matter to contractual co-determination so long as the effect is not to unreasonably restrain competition in the product market.

In practice, collective agreements cover a wide range of mandatory subjects and relatively few non-mandatory subjects, although there are significant variations between industries and enterprises. In the construction industry, contracts are simple and cover only the more basic terms; in auto and steel, contracts are complex and may touch almost every mandatory subject. Contracts in small enterprises tend to be simple, while contracts in large enterprises tend to be more complete. The initial contract between an employer and a union may be relatively simple, but as successive contracts are negotiated, more and more mandatory subjects are covered by more and more complex provisions. Indeed, the dominant characteristic of collective contracts is that as the bargaining relationship develops, the contract tends to reach every mandatory subject which is of substantial concern to the employees.⁵⁹

The typical collective agreement, other than in the construction industry, contains provisions concerning wages, hours, work schedules, overtime rates, job descriptions and classifications, promotions, layoffs, transfers, disciplinary penalties, vacations, holidays, sick leaves, funeral leaves, life insurance, medical insurance, pensions, and various other matters of special concern in the particular enterprise. In addition, there will be a number of provisions relating to the relations between the union and the employer and the administration of the agreement, which will be discussed below.

Equally important are the subjects that many collective agreements do not cover, particularly subjects in the non-mandatory area. Only one-half of the contracts covering 1,000 or more employees have any limitations on subcontracting; less than 20% require the employer to give notice of plant shutdowns, relocations, or technological changes; and only 10% provide for any allowances to workers who are relocated. The lack of any contractual provision means that employees have no effective participation in the decisions on those subjects.⁶⁰

The fact that the collective agreement contains provisions on a particular sub-

ject, however, does not necessarily mean that there is full co-determination on the subject, for the provisions may leave the employer with a wide range of discretion. For example, a promotion clause may require only that the employer give weight to seniority, but leave him free to promote a junior employee who is clearly better qualified; the employer may be allowed to deny sick leave unless the employee provides a doctor's certificate; and the employer may have substantial discretion to define punishable offenses and determine the appropriate disciplinary penalties. Where the employer has discretion under the contract, there can be worker participation in management's decisions to the extent that the union can urge the employer to use that discretion in a certain way. But the union cannot require him to discuss the decision, and the no-strike clause in the contract will bar the use of economic force to influence his decision. The employer is limited in his decision-making during the contract period only as the contract imposes limitations.

D. Union influence in contract administration

Worker participation does not end with the making of the collective agreement, for the agreement cannot provide specific answers for every problem which can arise during its term. The agreement is inevitably ambiguous and incomplete, and as problems arise the parties must work out solutions, even though the agreement gives little or no guidance. There must, therefore, be a continuing process of discussion and decision-making. Although this is commonly described in legal terms as 'interpreting and applying' the contract, it can be more accurately described in factual terms as clarifying and completing the contract. For the purpose of conducting this process, the collective agreement customarily creates a grievance procedure through which the parties can resolve problems as they arise. The grievance procedure is the structure of worker participation in decisions during the life of the agreement.

— The grievance procedure usually consists of appeals or steps up the hierarchy of management authority. The first step normally consists of the employee or his shop steward filing a grievance with the foreman. If no satisfactory answer is obtained, the union can appeal to the second step, which may be to the department supervisor, who meets with the shop committee. Again, if no settlement is reached, the union can appeal to the next step, and continue to press the grievance until the top level of management is reached. If no settlement is reached at the top step, the collective agreement normally provides that the dispute can be submitted to a neutral arbitrator selected by the parties. The arbitrator's decision is made final and binding by the collective contract.

The scope of the grievance procedure may be described by the contract as reaching "disputes concerning the interpretation and application of the agreement", making it coextensive with the collective agreement. But its scope may be more widely described by the contract as "any difference or dispute between the parties", thus allowing the union to raise grievances about matters not mentioned in

the agreement, and even matters which may not be mandatory subjects of bargaining. Regardless of the scope of the grievance procedure, the arbitration provision usually limits the arbitrator to 'interpreting and applying' the contract. This does not limit the cases which the arbitrator can decide so much as require that he decide them consistently with the parties' understanding of their agreement.

Three aspects of grievance and arbitration provisions should be emphasized. First, the grievance procedure provides a most important and immediate avenue of participation. It reaches the whole range of subjects covered by the collective agreement and often beyond to any complaint an employee may have. It gives meaning to the general terms of the contract by providing solutions to immediate problems. It provides continuing discussion of day-to-day problems at the shop floor level between representatives of the employees and representatives of the employer. For the individual employee, it provides a sense of direct participation; any employee who has a complaint can file a grievance with the union for presentation to the employer, with the union acting as his advocate. Second, the grievance procedure can not only influence but control management decisions. The procedure gives the union an opportunity at each level of management to persuade those at that level that management's decision is contrary to the contract or is either unreasonable or unjust, or that some compromise solution should be accepted. If no agreement is reached, the union can demand arbitration⁶¹ and obtain a legally binding decision as to whether management has acted contrary to the contract.⁶² Third, the processing of grievances is a union function.⁶³ Grievances are filed with the union shop stewards, presented by union committees, and appealed to arbitration by the union. Normally, the union controls access to the grievance procedure and determines whether to agree to a settlement, and most collective agreements provide that the union, not an employee, can appeal a grievance and demand arbitration. Thus, worker participation in the grievance procedure, as in negotiation of the agreement, is solely through the majority union.⁶⁴

4. Worker participation in union decisions

Workers can have a voice in management decisions only to the extent that they have a voice in the decisions of their representatives. The first level of influence and control is in their choice of representatives, and particularly their ability to change representatives. In the U.S., this avenue of influence is quite inadequate, for in most situations there is no realistic alternative to the incumbent union, and potential competition between unions is restrained by the No-Raiding Pact.⁶⁵ The workers' choice is between the incumbent union and no representation at all. For that reason, participation must come through internal decision-making processes of the union, the election of union officers and the determination of union policies.

Unions in the U.S. have traditionally built themselves on a democratic model, and union constitutions create a framework of mixed representative and direct

democracy. Officers are elected by the members, issues are discussed in local union meetings, decisions are made by majority vote, and the ultimate power to determine policy is vested in the members. This democratic structure responds to the union movement's historical claims that through unions "it is possible to introduce an element of democracy into the government of industry" and that unions enable "workers effectively to take part in determining the conditions under which they work".⁶⁶

Not all unions, however, have in fact been democratic. The form of democracy, in a few unions, has been a cloak for dictatorial control. As a result, the Labor Management Reporting And Disclosure Act (LMRDA) was enacted in 1959⁶⁷ to require unions to observe certain minimum democratic rights and procedures. One of the powerful arguments for legislatively imposing democratic standards on unions' internal processes was that the status of exclusive representative had been given by statute to the majority union. The Senate Committee on Labor, in recommending regulation of union elections, declared:

The Government which gives unions this power has an obligation to insure that the officials who wield it are responsive to the desires of the men and women they represent.⁶⁸

In this section, the principal statutory provisions which protect the union member's right to participate in the decision-making process of his union will be briefly sketched.⁶⁹ Beyond that, some of the customary structures and practices through which members participate in the making and administration of the collective agreement will be briefly described.

A. Statutory rights of participation in unions

The most important provisions in the LMRDA for membership participation and control are in Title IV, which requires periodic election of union officers and regulates the election process.⁷⁰ Local unions must elect officers at least once every three years by secret ballot of the members; and national or international unions must elect officers at least once every five years, either by secret ballot of the members, or at a convention of delegates chosen by secret ballot. The statute provides a wide range of safeguards to protect the election process. Reasonable opportunity must be given to nominate candidates; qualifications for candidates must be reasonable; notice of the time and place of the election must be mailed to every member 15 days before the election; every member in good standing is entitled to one vote; each candidate is entitled to have an observer at the polls and at the counting of the ballots; and the ballots must be preserved for one year.

In addition, Title IV protects free and open campaigning prior to the election. Every member has "the right to vote for and otherwise support" the candidate of his choice without being subject to discipline or reprisal of any kind; every candidate is entitled to equal access to membership lists and to have his campaign

literature distributed by mail to union members; and union funds, including the union journal, cannot be used to promote the candidacy of any candidate.

The purpose of the LMRDA is not to provide merely the form of periodic elections, but to provide the substance of free and open competition for union office, and to enable union members to make known through the election campaign and at the ballot box their satisfaction or dissatisfaction with the performance of their elected officers. If the election is not conducted in accordance with the statute, it can be set aside and a new election ordered, to be held under the supervision of the Secretary of Labor.

Other important provisions protecting membership participation are in Title I, *The Bill of Rights of Members of Labor Organizations*. The first section of *The Bill of Rights* guarantees every member "equal rights to nominate candidates, vote in elections or referendums, attend membership meetings, and participate in the debate and voting at those meetings". The second section guarantees freedom of speech and assembly within the union, protecting the right of members to organize groups within the union, speak at union meetings, distribute literature or make public statements. Union officers and union policies may be criticized or condemned in the most vigorous form without any restraint by union discipline or penalties.⁷¹ The effect of these provisions is to guarantee an open democratic political process within the union through which members can freely express their views on union policies and the conduct of union officers. The members thereby have a voice and can participate in the decision-making process, particularly at the level of the local union and the plant and in union referendums.

These rights of participation are reinforced by various other provisions of the LMRDA. For example, Title II requires unions to provide their members with annual financial reports, and gives members the right, upon showing reasonable cause, to examine the books and records of the union. And Title V imposes on union officers a fiduciary obligation to use union funds only for union purposes and to follow the mandates of the membership.

These rights of participation, it must be noted, run only to union members, not to all employees in the bargaining unit. Those who choose not to join the union are excluded from its decision-making process. Employees may also be excluded involuntarily, for there is no statutory requirement that the union accept all employees in the bargaining unit into membership. This, however, is no longer a substantial problem, for Title VII of the Civil Rights Act of 1964⁷² prohibits unions from discriminating in membership on the basis of race, color, religion, sex or national origin, and it is rare that any employee in the bargaining unit is denied admission to the union. The LMRDA does limit the union in expelling members it has admitted, prohibiting the discipline of a member for his exercise of rights guaranteed by the statute,⁷³ and requiring in any case that discipline such as expulsion be imposed only after a fair trial.⁷⁴

B. Customary structures for participation in bargaining

The law imposes no requirements as to the procedures unions must use in determining their bargaining demands, in ratifying collective contracts, or in handling grievances under the contract. These procedures are for each union to determine through its own constitution and by-laws. In practice, membership participation in making and administering collective agreements takes many forms, but customarily includes important elements of direct consultation or control by the members. In many unions, the members elect a special negotiating committee with representatives from different groups within the bargaining unit to participate in the negotiating of the contract. Grievances arising under the contract are commonly handled at the first step by shop stewards elected by the members in a department or area, and at later steps by an elected grievance committee.

In contract negotiations, the union's demands are commonly developed by discussions in union meetings or other methods of direct consultation. As negotiations progress, efforts are made to keep the members informed and to obtain their reactions to developments. When agreement is reached at the bargaining table, it is normally only tentative, for in most unions the contract must be approved by a vote of the membership. This vote is not an empty formality, for in more than 10% of the cases the first tentative agreement is voted down by the members.⁷⁵

In handling grievances arising under the collective contract, the shop steward or grievance committee may have authority to settle the grievance by not appealing to the next step, but in many unions the members may override this decision by voting to appeal. In some unions, the question whether or not to submit a grievance to arbitration is determined by a vote of the members.

Not all unions have structures and practices which allow the members to participate so effectively or directly in negotiating contracts and settling grievances. In some unions, an elected or appointed business agent may sign contracts and settle grievances with little consultation of the members and subject to no direct membership control. In such unions, membership participation comes only through the legally-protected process of criticism and debate and the periodic election of officers required by the statute. However, it is probably a safe generalization that union members participate more effectively and directly in the making and administration of collective contracts than in any other area of union decision-making.⁷⁶

C. The worker's right to fair representation

In addition to the right to participate in the union's decision-making process, the worker has a legally-protected right to have the union represent him fairly. This right has been created by the courts because of the union's control over the individual employee, and is designed to protect individuals and minority groups from the failure of the democratic process and the abusive use of majority power. When a

union of railroad workers negotiated an agreement placing black employees at the bottom of the seniority list, the U.S. Supreme Court declared:

[t]he organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and is to act for and not against those whom it represents. It is a principle of general application that the exercise of granted power to act on behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf...⁷⁷

The Court was emphatic that the bargaining representative had a "duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts". The Court, however, did not attempt to articulate any general standard as to what was fair or unfair. It recognized that the contract might have unfavorable effects on some employees, and variations in terms might be based on 'relevant differences' in conditions, but did not elaborate the standard beyond declaring that "discriminations based on race alone are obviously irrelevant or invidious". The union's duty, said the Court, was to represent all employees without hostile discrimination, fairly, impartially and in good faith.⁷⁸

Discrimination against individuals or groups based on irrelevant differences other than race are equally prohibited,⁷⁹ and that discrimination may be found in different treatment on dismissals, granting of vacations, or rates of pay, as well as manipulation of seniority rights.⁸⁰ But the courts have recognized that negotiating agreements requires compromises and adjustments of varied interests and groups, and the courts have stated that the union must be allowed "a wide range of reasonableness . . . subject always to complete good faith and honesty of purpose in the exercise of discretion".⁸¹ In practice, the courts have seldom found a violation of the duty of fair representation in the negotiation of an agreement, except where there has been discrimination on the basis of race or sex,⁸² or there has been some clear overreaching by a majority group within the union against a minority group.⁸³

The union's duty of fair representation extends to its administration of the collective agreement.⁸⁴ It cannot refuse to process the grievances of non-members, nor charge them a special fee for this service. As statutory representative, it assumes the obligation to represent all employees, and to represent them equally.⁸⁵

The union's authority to settle grievances and its refusal to carry cases to arbitration raises difficult legal problems. The individual employee acquires legally enforceable rights under the collective agreement, and in the absence of an arbitration clause the individual can sue in court to enforce those rights.⁸⁶ However, where the collective agreement provides for arbitration as the only method for adjudicating disputes, the employee is bound by that procedure. If the union refuses to take the case to arbitration, the individual can sue only if the union has violated its duty of fair representation in refusing to appeal the case.⁸⁷ The effect is that the union's settlement of a grievance is legally binding on the employee unless the settlement was a violation of the union's duty of fair representation.

The standard of the union's duty of fairness in grievance handling is somewhat more strict than its duty of fairness in negotiating agreements. The U.S. Supreme Court has said that the union must do more than act in "complete honesty and good faith"; the union must not act in an arbitrary manner, or "arbitrarily ignore a meritorious grievance or process it in a perfunctory manner."⁸⁸ If the union simply refuses to process a grievance when the employer has clearly violated the agreement, or settles a grievance on terms clearly contrary to the agreement, it would seem that the union was violating its duty not to "arbitrarily ignore a meritorious grievance".⁸⁹ If the union refuses to appeal an employee's grievance because of personal hostility,⁹⁰ political differences,⁹¹ or membership in another union,⁹² the union would clearly be violating its duty to provide fair representation. If the union is negligent in failing to file the grievance within the required time limits,⁹³ failing to investigate the merits of the grievance,⁹⁴ or failing to present evidence or arguments at the arbitration,⁹⁵ the union may be processing the grievance in a 'perfunctory manner'.

Although the standards of the duty of fairness are vague and incomplete, the duty of fair representation has great practical significance. The judicial declaration of the duty makes unions aware of the responsibility which goes with their authority as representative of the employees. This awareness is sharpened by the large number of suits brought by employees claiming violation of this duty, particularly in the settlement of grievances. Even though in a majority of these suits the courts find no violation of the duty of fair representation, the suits are constant reminders to the union, and the potential liability for damages increases the union's care in fulfilling its duties.

5. Employee representation on corporate boards

Collective bargaining in the U.S. has obvious analogs to works councils and other representation devices at the plant or enterprise level. But the U.S. has no analog to employee representation on corporate supervisory boards, and there is no substantial likelihood that such representation will be voluntarily established, much less be legally imposed.⁹⁶

As union leaders have so clearly emphasized, employee representation on supervisory boards runs contrary to the prevailing concept of collective bargaining as a system of structured confrontation. Representatives of employees and representatives of management are conceived of as separate and opposing entities dealing with each other across the bargaining table. Participation by the employer in the internal decision-making of the union is prohibited; participation by the workers through unions in the internal decision-making of the employer would be incongruous.⁹⁷

The unspoken premise of the reasoning is that employee participation can only be through the union which acts as the collective bargaining representative.

Employee representation is assumed to mean union representation, because neither the law nor practice in the U.S. has made provision for any structure of participation coordinate with or supplementary to the union. The possibility that members of the corporate boards might be elected by the employees, as contrasted with selected by the union, has never been considered.

Under existing law, union representation on corporate boards is possible only through voluntary action by the shareholders. This would clearly not be a mandatory subject of bargaining. The union, therefore, could not insist that it be discussed at the bargaining table, nor could the union strike to achieve it. Even if the shareholders were willing to elect to the corporate board members nominated by the union, two serious legal issues would be presented.

First, for a union representative to serve on the board of a corporation with which his union bargained collectively would place him in a position where his responsibility to the corporation would conflict with this fiduciary obligation to the union and its members. Section 501 of the LMRDA declares that "officers, agents, shop stewards and other representatives" of a union occupy "positions of trust", and then provides:

It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, ... to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any personal interest which conflicts with the interests of such organization⁹⁸

Whether the union nominated a union official or an outsider to the board of directors, the person would seem to be a 'union representative' within the meaning of the statute. In his position on the board, he would be participating in decisions affecting wage and employment policies, and even decisions as to collective bargaining demands, strikes and lockouts. Unless it were assumed that as a corporate director he had no obligation to the shareholders,⁹⁹ he would be dealing with the union as an 'adverse party', and his personal interests would 'conflict with the interests' of the union. This is particularly true in a collective bargaining system which is built upon the principles of confrontation between the employer and the union and insistence on complete arm's length bargaining between the adverse parties.¹⁰⁰

Second, for a union representative to sit on a corporate board would raise serious questions of unlawful restraint of competition. In the *Jewel Tea*¹⁰¹ case, the U.S. Supreme Court stated that a union and a single employer could be found in violation of the anti-trust laws if they made an agreement concerning a matter which was not "intimately related to wages, hours and working conditions" and not a mandatory subject of bargaining, and the agreement created an unreasonable restraint on competition in the product market. For a union representative on a corporate board to participate in a decision on matters such as prices, marketing policies, or product lines would place both the union and company in jeopardy.

The decision could be viewed as an agreement or combination between the company and the union on a non-mandatory subject which reasonably restrained competition.

If two or more employers competing in the same product market placed representatives from the same union on their respective boards of directors, even more serious problems would be raised. Interlocking directorates are generally prohibited under the anti-trust laws,¹⁰² and they would seem no less dangerous to free competition if they were linked together through a national union.¹⁰³ Union representatives on corporate boards would have the incentive and ability to reduce competition in the product market in order to protect the jobs of employees in less efficient enterprises. Proposals at one corporate board to build a new plant, introduce a new product line, engage in a sales campaign or lower prices might be opposed by union representatives on the board if the effect would be to put another company employing union members under competitive pressure and cause the loss of jobs in the second company. Other potentials for collusion or parallel action on prices and other factors of competition are obvious.

The problems of fiduciary responsibility and restraints on competition would be significantly different if the employee representatives on the board were nominated by the employees, rather than by the union. If the employees, acting without a union, nominated one or more members of the board for election by the shareholders, those board members would not be representatives of a labor organization and, therefore, not covered by Section 501 of the LMRDA.¹⁰⁴ Similarly, their membership and actions on the board would seem not to be any more vulnerable to the anti-trust laws than the membership and action of any other member of the board. Such a device, however, is legally possible only where there is no majority union or where the majority union does not object. In short, under present law employee representation on corporate boards can come only through voluntary action by shareholders, which is highly unlikely; and where a majority union exists, it would have to consent to the selection of the representative by the employees and not the union, an encroachment on the union's status as exclusive representative to which the union is not likely to consent.

6. Conclusion

When collective bargaining in the U.S. is viewed as a system for providing employee participation in the decisions of corporate management, four conclusions stand out.

First, collective bargaining is only a partial system; indeed, from a broad social perspective it is scarcely a system at all. Participation requires unionization and this extends to less than one-third of the employed work force. More than two-thirds of all employees have no union, no collective agreement, and no effective voice in management decision-making. Collective bargaining provides participation only for a minority.

Even in enterprises where collective bargaining exists, fragmented bargaining units result in fragmented representation, with some employees unrepresented. Almost inevitably, each union speaks for the special interests of those it represents; the voice of some employees is strong and the voice of others is not heard at all, and no union or other body is able to speak for all the employees as a group.

This partial and fragmented system is reinforced by the law which not only fails to provide other forms of representation, but imposes barriers against the employer or the employees creating other structures for participation.

Second, collective bargaining reaches only a limited range of management decisions. It provides no legal right to participate in many decisions of crucial concern to the employees. Thus, management can decide unilaterally without notice or discussion to change production processes, eliminate operations or close plants, even though those decisions require employees to transfer or result in their dismissal.

The boundaries around 'mandatory' subjects of bargaining also mark the boundaries around the employer's duty to provide information to the union. The law does not require, nor can the union use its economic strength to require, that the employer keep the union informed of its general financial condition, its prospects, or its plans for changes in operations, even though these matters are of vital interest to the employees.

Even the limited area of participation prescribed by the statute can be substantially narrowed if the employer bargains for a management prerogatives clause which gives him the freedom to act unilaterally on certain matters. Thus, decisions as to working hours, speed of production, job assignments and dismissals can be removed from the area of participation by an employer who has the economic strength to obtain such concessions from the union. The employees' right to participate depends upon the union's economic strength to resist employer encroachments.

Third, where collective bargaining exists, and within the area covered by the collective agreement, employee participation is intensive and vital. The grievance procedure provides a continuing and direct participation both on matters which concern individual employees and matters which concern the employees as a group. Arbitration, as the last step in that procedure, serves to fill out the details and complete the agreement and to compel compliance by the employer.

The democratic character of unions, reinforced by statutory provisions, gives employees a voice in the union which represents them. The democratic rights to participate in union decisions, to criticize union officers and policies, to organize opposition groups within the union, and to have open and honest elections are legally protected. In addition, the negotiation and ratification of collective agreements, and the processing and settlement of grievances is often subject to direct membership control.

To the extent that democratic processes and majority rule create dangers for isolated individuals or insular minorities, the law imposes on the union the duty to

represent fairly all of the employees, member and non-member alike.

Fourth, the process of participation is characterized more by confrontation than cooperation. The law prohibits worker representation other than by an independent adversary, requires arm's length bargaining, and limits the union's right to information and discussion to those subjects which are to be resolved by economic conflict. These legal rules reflect and reinforce dominant social attitudes. Few employees have fully accepted the concept that the employees are partners in the enterprise who are entitled to share in management decisions or even to know the problems and prospects of the enterprise. The union, as their representative, is viewed as an adversary or even hostile party to management, with which management must bargain but not share decision-making. Most unions have reciprocated by considering it their function to obtain as much as possible for the employees and rejecting responsibility for the profitability of the enterprise.

Notes

¹ Ellenberger, *The Realities of Co-Determination*, AFL-CIO American Federationist, Oct. 1977, at 15.

² *Id.*

³ Final Report of the Industrial Commission Created by Act of Congress, 1898, at 800–807 (1902), reprinted in C. Summers and H. Wellington, *Cases and Materials on Labor Law*, at 12 (1968).

⁴ Final Report of the United States Commission on Industrial Relations, Sen. Doc. No. 415, 64th Cong., 1st Sess. (1916).

⁵ Statement of Louis D. Brandeis before the United States Commission on Industrial Relations, January 23, 1915, reprinted in Summers and Wellington, *op. cit. supra* n. 3, at 13.

⁶ Both labor law and collective bargaining practices in the U.S. have been shaped by the National Labor Relations Act (NLRA) enacted in 1935, 49 Stat. 449 (1935), and amended in 1947 (61 Stat. 1336) and in 1959 (73 Stat. 541) (current version at 29 U.S.C. §§ 151–69 (1970)). Railways and airlines are governed by a separate but similar statute, 45 U.S.C. §§ 151–88 (1970). A number of states have passed similar statutes applicable to small local employers. See C. Killingsworth, *State Labor Relations Acts* (1948). Because the National Labor Relations Act has had such dominant influence, the discussions and citations in this article will concentrate on its provisions and the practices which have developed under it.

⁷ The worker participation systems of countries in the European Community are briefly described in Commission of the European Communities, *Employee Participation and Company Structure*, 1975 Bull. Eur. Communities, Supplement 8/75.

⁸ *Id.*

⁹ Statement of Louis D. Brandeis before the United States Commission on Industrial Relations, January 23, 1915, reprinted in Summers and Wellington, *op. cit. supra* n. 5, at 13.

¹⁰ A union can consist of only employees in a single plant or enterprise and be wholly unaffiliated with any national union or federation. Such unions are not common and are seldom effective. See A. Shostack, *America's Forgotten Labor Organization* (1962). Such unions have about 1% of the collective agreements in plants with 1,000 or more employees. Bureau of Labor Statistics, U.S. Dep't of Labor, *Directory of National and International Labor Unions in the United States 84–88* (1974) [hereinafter cited as *Directory*]. Theoretically, an individual, committee or organization other than a union can be designated by the employees as their representative for collective bargaining. This, however, does not occur; the representative is always a union.

¹¹ See generally C. Rehmus and D. McLaughlin, *Labor and American Politics* (1967); D. Bok and J. Dunlop, *Labor and the American Community* 384–426 (1970).

¹² Betriebsverfassungsgesetz, 15. Jan. 1972.

¹³ 29 U.S.C. § 157 (1970).

¹⁴ 29 U.S.C. § 158(a) (3) (1970). An employee may, however, be required by a collective agreement to contribute to the union an amount equal to the ordinary union dues and initiation fees as a condition of continued employment, even if he does not join the union.

¹⁵ National Labor Relations Board, U.S. Dep't of Labor, *Fortieth Annual Report of the National Labor Relations Board*, App. Tables 3A, 4, 13–14 (1975) (fiscal year ended June 30, 1975) [hereinafter cited as *Fortieth Annual Report*].

¹⁶ The total number of complaints filed against unions in fiscal year 1975 was 535. *Id.*, App. Table 3A.

¹⁷ Section 9(a) of the National Labor Relations Act provides:

Representatives designated or selected for purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes shall be the exclusive representatives of

all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other terms and conditions of employment ... 29 U.S.C. §159(a) (1970).

¹⁸ Collective agreements in the public and private sector cover 22.5 million employees. This is approximately 27% of the non-agricultural work force. The percentage of employees covered is approximately the same in the public and private sectors. Directory, *supra* n. 10, at 84-88. The number of employees covered by collective agreements is somewhat larger than the number of union members. In the private sector, there are approximately 19.4 million union members, constituting 26.4% of the non-agricultural work force. Bureau of Labor Statistics, U.S. Dep't of Labor, Handbook of Labor Statistics (1976). There is almost no unionization or collective bargaining among agricultural workers.

¹⁹ Directory, *supra* n. 10, at 85.

²⁰ Section 9(a) of the National Labor Relations Act, *quoted in* n. 17, *supra*. See *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944).

²¹ *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342 (1944).

²² 29 U.S.C. §176 (1970). See D. Cullen, *National Emergency Strikes* (1968).

²³ See U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 1888, *Major Collective Bargaining Agreements 77* (1975) [hereinafter cited as *Major Collective Bargaining Agreements*].

²⁴ *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Linden Lumber Div., Summer and Co. v. NLRB*, 419 U.S. 301 (1974).

²⁵ Fortieth Annual Report, *supra* n. 15, at App. Table 13.

²⁶ See Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38 (1964); J. Getman, S. Goldberg and J. Herman, *Union Representation Elections: Law and Reality* (1976).

²⁷ See R. Gorman, *Basic Text on Labor Law, Unionization and Collective Bargaining* 40-61 (1976).

²⁸ See Krislov, *The No-Raiding Agreements After Five Years*, 10 Lab. L.J. 861 (1959).

²⁹ *United Textile Workers v. Textile Workers Union*, 258 F. 2d 743 (7th Cir. 1958).

³⁰ Fortieth Annual Report, *supra* n. 15, at App. Table 13.

³¹ 29 U.S.C. §401-531 (1970).

³² One exception, developed by the National Labor Relations Board and the courts, without any express statutory provision, is that a union which refuses to admit employees to membership because of their race, religion, nationality or sex is barred from representing bargaining units which have employees in the excluded groups. *Bekins Moving and Storage Co.*, 211 N.L.R.B. 138 (1974); *NLRB v. Mansion House Center Mgt. Corp.*, 473 F. 2d 471 (8th Cir. 1973).

³³ An attempt by a local union to represent employees outside its jurisdiction may lead to action by the parent international union; and an attempt by a national union affiliated with the AFL-CIO to exceed its jurisdiction may lead to action by the AFL-CIO, or by competing unions. These, however, are considered internal union matters governed by the union's constitution or by-laws, or by no-raiding agreements. They are not matters for the National Labor Relations Board. *NLRB v. Weyerhaeuser Co.*, 276 F.2d 865 (7th Cir. 1960).

³⁴ One exception is that plant guards cannot be represented by a union which admits employees other than guards to membership, or which is affiliated with a union which includes non-guards. 29 U.S.C. §159 (b) (3) (1970).

³⁵ See, e.g., *Twentieth Century Fund, Labor and the Government* 65-113 (1935).

³⁶ See Gorman, *op. cit. supra* n. 27, at 195-208.

³⁷ *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959). A labor organization which consists of little more than a shop committee elected by the employees with no dues, no constitution and

no provision for employee membership may be the bargaining representative, but it must be independent of employer control and participation. *Coppus Engineering Corp. v. NLRB*, 240 F.2d 564 (1st Cir. 1975); *Federal-Mogul Corp., Coldwater Distribution Center Div. v. NLRB*, 394 F.2d 915 (6th Cir. 1968).

³⁸ *Alta Bates Hospital*, 226 N.L.R.B. 485 (1976); *Duquesne University*, 198 N.L.R.B. 891 (1972). *But see Hertzka and Knowles v. NLRB*, 503 F.2d 625 (9th Cir. 1974).

³⁹ See generally, Note, *Section 8 (a) (2): Employer Assistance to Plant Unions and Committees*, 9 Stan. L. Rev. 351 (1957); Note, *Does Employer Implementation of Employee Production Teams Violate Section 8 (a) (2) of the National Labor Relations Act?*, 49 Ind. L.J. 516 (1974); Note, *New Standards for Domination and Support under Section 8 (a) (2)*, 82 Yale L.J. 510 (1973).

⁴⁰ "There is a line between cooperation and domination, and the purpose of the Act is to encourage cooperation and to discourage domination.... The test of whether the organization is employer controlled is not an objective one, but rather subjective from the standpoint of employees." *Modern Plastics Corp. v. NLRB*, 379 F.2d 201, 204 (6th Cir. 1967) (citations omitted). Such assistance can be given not only to regular trade unions, but to independent plant unions and informal plant committees. *Hotpoint Co. v. NLRB*, 289 F.2d 683 (7th Cir. 1961); *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165 (7th Cir. 1955).

⁴¹ A survey in 1960 indicated that more than half of all collective agreements provide for payment to union representatives for time spent in investigating, presenting and processing grievances. Dwyer, *Employer-Paid "Union Time" Under the Federal Labor Laws*, 12 Lab. L.J. 236 (1961).

⁴² See J. Abodeely, *The NLRB and the Appropriate Bargaining Unit* (1971); Gorman, *op. cit. supra* n. 27, at 66-92.

⁴³ 29 U.S.C. § 159 (b) (1970).

⁴⁴ C. Rehmus, *Multi-employer Bargaining* (1965). Multi-employer units must be based on consent by both the employer and the union. The Board cannot compel employers to become part of a multi-employer unit or to remain in the unit because the principle of majority rule does not apply on the employers' side, nor is there any election among employers. Because any employer can refuse to be a part of the unit and bargain separately, the union has an equal freedom to fragment the unit. The Board, however, has developed rather strict rules as to when an employer or union can break out of the multi-employer unit. *Publishers' Assn. of New York v. NLRB*, 364 F.2d 293 (2d Cir. 1966); *NLRB v. Hi-Way Billboards, Inc.*, 500 F.2d 181 (5th Cir. 1974).

⁴⁵ See Gorman, *op. cit. supra* n. 27, at 66-92.

⁴⁶ The law requires that professional employees not be included in a unit that includes non-professional employees unless they vote to be included in such units. See n. 34, *supra*, with respect to plant guards. Supervisors are expressly excluded from the definition of 'employee' in the statute. They are considered a part of management and have no protected right to organize, to select representatives, or to bargain collectively. Supervisors include anyone who has authority to direct employees or effectively recommend hiring, promotion, transfer or dismissal or to adjust their grievances. 29 U.S.C. § 152 (11) (1970).

⁴⁷ See, e.g., A. Weber, *The Structure of Collective Bargaining* (1961). The fragmentation of bargaining is indicated by the fact that there are approximately 165,000 separate collective agreements, and ten international unions have more than 5,000 collective agreements apiece. *Directory, supra* n. 10, at 86-8.

⁴⁸ 29 U.S.C. § 158 (d) (1970). Whether the employer's conduct at the bargaining table constitutes 'good faith bargaining' presents difficult questions for which there are no clear or simple answers. It has been said that bad faith is "a desire not to reach an agreement with the union", and that "[t]he employer is obligated to make some reasonable effort in some direction to compose his differences with the union...". *NLRB v. Reed and Prince Mfg. Co.*, 205 F.

2d 131, 134–5 (1st Cir. 1953) (emphasis in original). See generally Gorman, *op. cit. supra* n. 27, at 399–495; Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401 (1958).

⁴⁹ H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970).

⁵⁰ NLRB v. Katz, 369 U.S. 736 (1962). 'Bargaining to impasse', although difficult to define precisely, means generally bargaining in good faith until the parties reach a deadlock and further negotiations are not likely to move the parties any further toward agreement.

⁵¹ NLRB v. J.H. Allison and Co., 165 F.2d 766 (6th Cir. 1948); Inland Steel v. NLRB, 170 F.2d 247 (7th Cir. 1948).

⁵² NLRB v. Insurance Agents, 361 U.S. 477 (1960).

⁵³ NLRB v. Wooster Div., Borg-Warner Corp., 356 U.S. 342 (1958).

⁵⁴ NLRB v. American Natl. Ins. Co., 343 U.S. 395 (1952).

⁵⁵ See generally Gorman, *op. cit. supra* n. 27, at 496–531.

⁵⁶ Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964).

⁵⁷ *Id.* at 223.

⁵⁸ See Gorman, *op. cit. supra* n. 27, at 514–23.

⁵⁹ Major Collective Bargaining Agreements, *supra* n. 23, at 77.

⁶⁰ *Id.* at 71–73.

⁶¹ Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

⁶² United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960).

⁶³ The statute does not vest in the union exclusive power to settle grievances. Section 9 (a), 29 U.S.C. §159 (a) (1970), provides that individual employees or groups of employees can present grievances to their employer and have such grievances adjusted without the intervention of the union as long as the adjustment is consistent with the terms of the collective agreement. The courts have held, however, that the collective agreement can prohibit such individual and group grievances and give exclusive control over all grievance presentation and settlement to the union. Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965); Vaca v. Sipes, 386 U.S. 171 (1967).

⁶⁴ The union may be liable to the individual if the union in handling the grievance violates its duty to represent the employee fairly. Vaca v. Sipes, *supra* n. 63, at 185–86. The scope of this duty is discussed in the next section.

⁶⁵ See text accompanying notes 28 and 29, *supra*.

⁶⁶ Final Report of the Industrial Commission, cited in n. 3, *supra*, reprinted in Summers and Wellington, *op. cit. supra* n. 3, at 12.

⁶⁷ 29 U.S.C. §§ 401–531 (1970).

⁶⁸ Senate Committee on Labor, Rep. No. 187, 86th Cong., 1st Sess. 20 (1959).

⁶⁹ See generally Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 851 (1960); Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 818 (1960); Summers, *American Legislation for Union Democracy*, 25 Mod. L. Rev. 273 (1962).

⁷⁰ See generally Note, *Union Elections and the LMRDA: Thirteen Years of Use and Abuse*, 81 Yale L.J. 407 (1972).

⁷¹ Even statements which are defamatory of union officers cannot be punished by union tribunals. The only recourse is suit in the courts. Salzhandler v. Caputo, 316 F.2d 445 (2d Cir. 1963); Boilermakers v. Rafferty, 348 F.2d 307 (9th Cir. 1965).

⁷² 42 U.S.C. 2000e–2 (c) (1970).

⁷³ 29 U.S.C. §529 (1970).

⁷⁴ 29 U.S.C. §411 (a) (5) (1970).

⁷⁵ Summers, *Ratification of Agreements*, in *Frontiers of Collective Bargaining* 75–102 (J. Dunlop and N. Chamberlain eds. 1967); Bureau of National Affairs, *Labor Relations Yearbook* 39–40 (1975).

⁷⁶ See Lahne, *Union Constitutions and Collective Bargaining Procedures*, in *Trade Union Government and Collective Bargaining* 167–195 (J. Seidman ed. 1970).

⁷⁷ *Steele v. Louisville and Nashville R.R. Co.*, 323 U.S. 192, 202 (1944) (footnote omitted).

⁷⁸ *Id.* at 203.

⁷⁹ *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

⁸⁰ *Radio Officers v. NLRB*, 347 U.S. 17 (1954).

⁸¹ *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

⁸² *Petersen v. Rath Packing Co.*, 461 F.2d 312 (8th Cir. 1972).

⁸³ *NLRB v. General Truck Drivers, Local 315*, 545 F.2d 1173 (9th Cir. 1976).

⁸⁴ *Conley v. Gibson*, 355 U.S. 41 (1957); *Humphrey v. Moore*, 375 U.S. 335 (1964).

⁸⁵ *Hughes Tool Co.*, 104 N.L.R.B. 318 (1953).

⁸⁶ *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962).

⁸⁷ *Vaca v. Sipes*, 386 U.S. 171 (1967).

⁸⁸ *Id.* at 191.

⁸⁹ *Butler v. Teamsters Local 823*, 514 F.2d 442 (8th Cir. 1975), *cert. denied*, 423 U.S. 924 (1975). *Cf.* *Price v. Teamsters*, 457 F.2d 605 (3rd Cir. 1972) (judgment of grievance committee binding on employee unless dishonest, capricious, or beyond its authority).

⁹⁰ *Local 13 I.L.W.U. v. Pacific Maritime Ass'n*, 441 F.2d 1061 (9th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972).

⁹¹ *NLRB v. Local 485, I.U.E.W.*, 454 F.2d 17 (2d Cir. 1972).

⁹² *NLRB v. Teamsters Local 396*, 509 F.2d 1075 (9th Cir. 1975), *cert. denied*, 421 U.S. 976 (1975).

⁹³ *Ruzika v. General Motors Corp.*, 523 F.2d 306 (6th Cir. 1975).

⁹⁴ *Minnis v. UAW*, 531 F.2d 850 (8th Cir. 1975); *Hines v. Teamsters Local 377*, 506 F.2d 1153 (6th Cir. 1974), *modified*, 424 U.S. 554 (1976).

⁹⁵ *Holodnak v. Avco*, 381 F. Supp. 191 (D. Conn. 1974), *modified*, 514 F.2d 285 (2d Cir. 1975), *cert. denied*, 423 U.S. 892 (1975).

⁹⁶ Various proposals for representation on corporate boards of representatives of employees, consumers or other interest groups are discussed in Blumberg, *Reflections on Proposals for Corporate Reform Through Change in the Composition of the Board of Directors: "Special Interest" or "Public" Directors*, 53 Boston U.L. Rev. 547 (1973). The author concludes that such representation plans "are no more than topics for academic discussion in the United States". *Id.* at 573. See also Solomon, *Toward a Federal Policy on Work: Restructuring the Governance of Corporations*, 43 Geo. Wash. L. Rev. 1263 (1975); Schoenbraum and Lieser, *Reform of the Structure of the American Corporation: the "Two Tier" Board Model*, 62 Ken. L.J. 91 (1973).

⁹⁷ For a full development of this argument, see Markham, *Restrictions on Shared Decision-Making Authority in American Business*, 11 Calif. W.L. Rev. 217 (1975).

⁹⁸ 29 U.S.C. §501 (a) (1970).

⁹⁹ The corporate director's responsibility to the corporation is not clearly defined. The earlier view that directors owed their loyalty solely to the shareholders has been modified to allow directors to represent the interests of customers, creditors, and the public. A. Berle, *The 20th Century Capitalist Revolution* 169 (1954); Weiner, *The Berle-Dodd Dialogue on the Concept of the Corporation*, 64 Colum. L. Rev. 1458 (1964); W. Cary, *Corporations: Cases and Materials* 237-49 (4th ed. 1969). Although there has been acceptance of the idea that corporate directors are not required to pursue single-mindedly the interests of the shareholders, it is doubtful that a director could assert that he had no obligation to consider the interests of the shareholders.

¹⁰⁰ For an argument that union representation on the board of directors might violate Section 8(a) (2) of the NLRA prohibiting employer domination or interference with the union, see Markham, *op. cit. supra* n. 97, at 227-32. It is difficult, however, to see how the shareholders' acceptance of a nominee of the union as a member of the board would dominate or interfere with the union.

¹⁰¹ Local 189, *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965).

¹⁰² The Clayton Act, Section 8, addresses the problem of interlocking directorates. 15 U.S.C. §19 (1970). See also Travers, *Interlocks in Corporate Management and the Antitrust Laws*, 46 Tex. L. Rev. 819 (1968). The violation would not be merely because officers from the same union served on boards of competing companies, but rather because they were named by the union to those positions.

¹⁰³ Cf. *U.S. v. Brims*, 272 U.S. 549 (1926); *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945); *UMW v. Pennington*, 381 U.S. 657 (1965) (agreements between unions and employers for 'mutual self-help' are violations of the antitrust laws if they result in monopoly or in significant restraints on interstate commerce).

¹⁰⁴ See 29 U.S.C. §501 (1970).

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